118-196

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

THE IRON SILVER MINING COMPANY,
Plaintiff in Error,

vs.

THE ELGIN MINING & SMELTING CO., *et al.*

No. 200.

In Error to the Circuit Court of the United States for the District of Colorado.

WALTER H. SMITH,
Atty for Pl'ff in Error.

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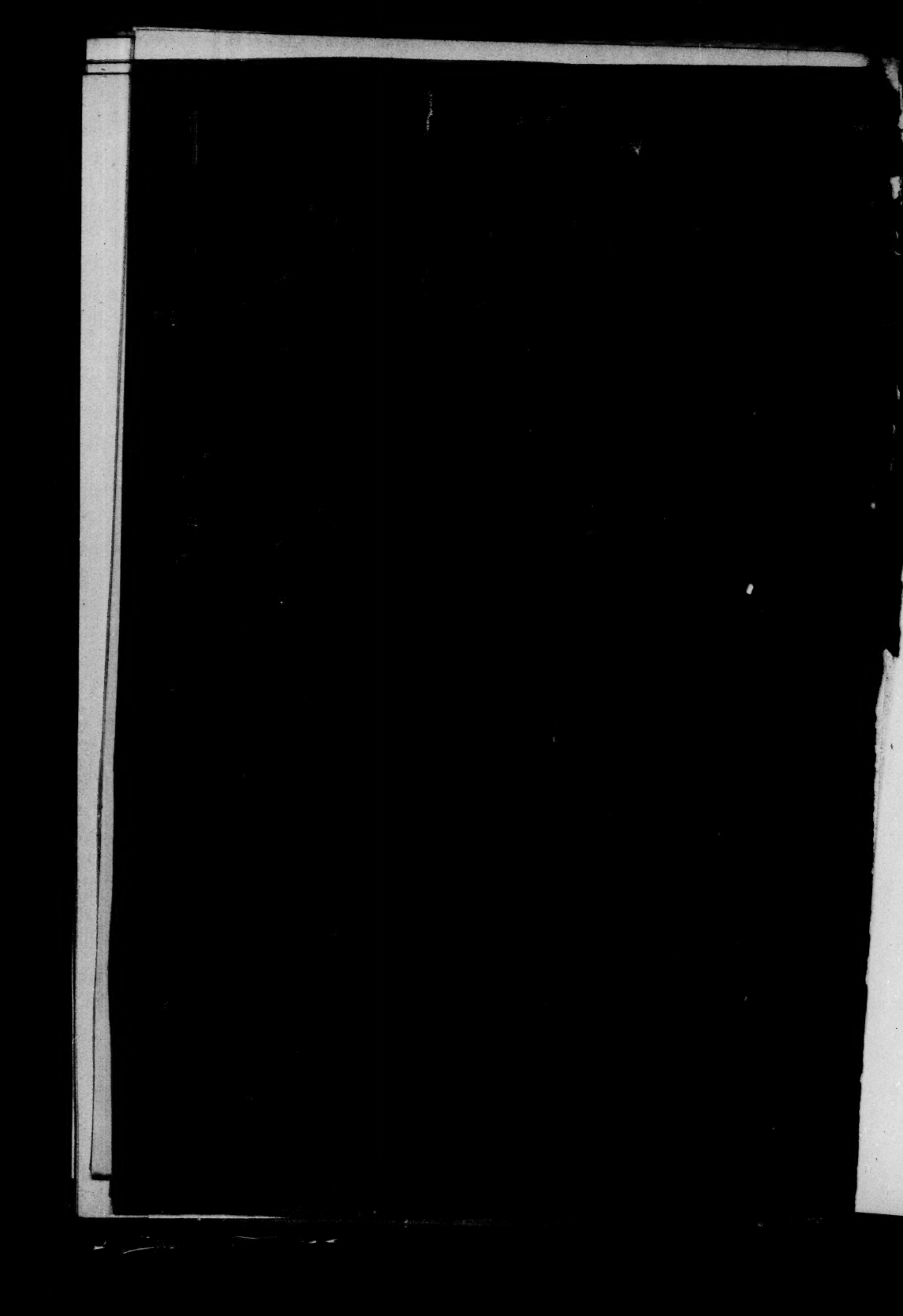

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STATEMENT OF THE CASE.

On the 29th of June, 1882, the defendants in error, the Elgin Mining and Smelting Company, John W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman and William Havens filed their complaint, in the United States Circuit Court for the District of Colorado, against the Iron Silver Mining Company, the plaintiff in error. The complaint was demurred to, and before the demurer was disposed of by the Court, the plaintiffs below asked and obtained leave to file an amended complaint. The amended complaint was intended as a substitute for the original, and was filed on the 21st of October, 1882.

It alleged that all of the plaintiffs were citizens of the State of Colorado, and that the defendant was a citizen of the State of New York. It further alleged that the plaintiffs were the

owners of the Gilt Edge Lode, situate in California Gulch, in the California mining district in the County of Lake and State of Colorado, and had received a patent therefor, and that the defendant, the said Iron Silver Mining Company, had by means of drifts, inclines and tunnels driven into the said Gilt Edge Lode, underneath said lode, entered into possession of the same, and taken and carried away large quantities of silver, gold and lead ores belonging to plaintiffs.

It prayed for judgment against the defendant for the possession of said lode, and fifty thousand dollars damages.

The defendant below filed its answer to said complainant on the 30th of October, 1882.

This answer denied that the plaintiffs, or any or either of them ever were citizens of the State of Colorado. It denied all the allegations of the complaint.

It alleged, by way of new matter, that the defendant was the owner of and had received a patent for the Stone Lode, situate in said California mining district; that the apex of the vein was within the surface limits of the Stone claim, and extended its entire length from north to south, between walls of rock in place, with a limestone foot wall and a porphyry hanging wall; that the true strike of the vein was north and south, and the dip east, at an angle of 15° below the plain of the horizon; that said vein, within vertical planes drawn downward through the end lines of said vein, found within the Stone surface claim, and continued in their own direction, being the direction of the dip of said vein, passed out of the vertical side lines of said Stone surface claim, and beyond the east vertical side line of the said Gilt Edge surface claim, and included that portion of the Gilt Edge lode and the ore in controversy in this case.

The plaintiffs filed a replication to all the allegations of new matter, except those contained in the 12th paragraph of the answer, which alleged that vertical planes drawn through the end lines of the vein, as found within the sur-

face of the Stone claim, and continued in the direction of the dip of said vein, would extend outside of the vertical side line of the Stone claim, and into and under the Gilt Edge Lode, and include the premises and ore in controversy. As to this 12th paragraph, the plaintiffs demurred. The Court overruled the demurrer, and the plaintiffs thereupon filed their replication, taking issue upon the same.

A stipulation was filed submitting the cause to the Court without the intervention of a jury.

On the 2d of December, 1882, the case was tried by the Court, and judgment given for the plaintiffs for the possession of the premises in controversy, and for the costs of suit.

A bill of exceptions was taken, embodying all the evidence in the case. From this it appears that the defendant below, and plaintiff in error, offered to prove certain matters which the Court refused to allow. They will be fully stated hereafter. A writ of error has been sued out in this Court, and the following is the

Assignment of Errors.

I. The Court erred in refusing to allow the defendant below to prove that the Stone vein was a vein, lode or ledge of rock in place, bearing iron, lead and silver in large quantities, and was valuable on account thereof.

II. The Court erred in refusing to allow the defendant below to prove that the top, apex, and outcrop of said Stone vein was found in the surface of the Stone claim, through the entire extent, from north to south between walls of rock in place, with a limestone foot wall and porphyry hanging wall.

III. The Court erred in refusing to allow the defendant below to prove that the true strike of said Stone vein was

north and south, and the dip to the east at an angle of 15° below the plane of the horizon.

IV. The Court erred in refusing to allow the defendant below to prove that vertical planes, drawn downward through the end lines of the said Stone vein, existing and found within the surface claim of the said Stone claim, and continued in their own direction, to wit: in the direction of the dip of said vein, would pass through, out of and beyond the east vertical side line of said Stone surface claim, and into and under the adjoining Gilt Edge surface claim, and thereby include the premises and ores in controversy.

V. The Court erred in refusing to allow the defendant below to prove that it had not mined in or upon the said Gilt Edge Lode, or interferred therewith, except as above.

VI. The Court erred in rendering a judgment against this defendant for the reason that the record shows that the Court had no jurisdiction of the case, it not appearing that the parties plaintiff below were citizens of a different State from that of the defendant below.

VII. The Court erred in rendering a judgment against the defendant below, when, by the laws of the land, its judgment should have been in favor of the defendant.

Argument.

The bill of exceptions shows that the plaintiffs below made out a *prima facie* case (except as to the question of citizenship), and were entitled to a judgment against the defendant below, unless it made good its defense set forth in the new matter contained in its answer. That defense was founded on Section 2322 of the Revised Statutes of the United States, which is in these words:

"SEC. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial, and local regulations, not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their location, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

This section is taken from the act of May 10, 1872, being the 3d section of that act. 17 Stat., 91.

The 2d section of the same act provided, for the first time, that all locations made thereafter should not exceed fifteen hundred feet in length along the vein or lode, and three hundred feet on each side of the middle of the vein at the surface, and that the end lines, should be parallel. 17 Stat, 91, Rev. Stat, Sec. 2,320.

Prior to that act, locations were governed by the local customs or rules of miners in the particular district where

the location was made. Sec. 2, act of July 26, 1866, 14 Stat., 251.

This act gave to the patentee the—

> "Mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold, subject to this condition." Sec. 2, do.

In the case at bar it is important to ascertain the true construction of Sec. 2,322, found in the Revised Statutes. Did it intend to limit the right of a locator to go outside of his surface side lines, to those locations only, which had parallel end lines, or was the right intended to apply to some locations, the end lines of which were not parallel?

I shall maintain that it applied to some that did not have parallel end lines.

On its face and according to its express terms, it applies to all locations made before May 10, 1872 (the date of the passage of the act of May 10, 1872, from which Sec. 2,322 is taken), as to which there was no adverse claim on that date. Locations made prior to that date, were not required to have parallel end lines. The fact, therefore, that they are mentioned and given in express terms, the right to go outside of their side lines requires that such a construction should be given to the section as will secure to them the rights expressly granted. And that construction is this: The locators have the right to go outside of their side lines into adjoining premises, for so much of the lode or vein as would be included within parallel, vertical planes drawn through the ends of the vein included in the surface limits (not the end lines of the claim) at right angles to the strike. This construction would not give them as much as did the act of 1866, or as much as does the act of 1872, when the end lines are parallel.

In the case at bar the topography of the country was such that it was impossible to make a location 1,500 feet in length in the shape of a parallelogram, or in any other form with parallel sides. (Record, plat A, pp. 24–5.)

The premises are situated in a deep gulch, California Gulch, with great irregularities of surface.

This gulch is supposed to have been created by erosion. Its origin is immaterial. The important matter is that a mining location upon it must of necessity be very irregular, and that is the character of the Stone location. Immediately adjoining it, on the east, is the Gilt Edge location. It is quite irregular in form, but not so much so as the Stone.

I come now to consider the errors assigned in this record. The 1st, 2d and 3d relate to proofs offered as to the character of the Stone lode as a mineral bearing lode, its apex, strike and dip.

The defendant gave in evidence its patent for the Stone Lode.

I quote from the record:

> "And the defendant further to prove the issues on its part offered to prove—
>
> "(1.) That said Stone vein, lode or ledge, mentioned in said patent, is a vein, lode or ledge of rock in place, bearing iron, lead and silver in large quantities, and is valuable on account thereof.
>
> (2.) That the top, apex, and outcrop of said vein, lode, or ledge exists and is found in said Stone surface claim through its entire extent from north to south between walls of rock in place, a limestone foot-wall, and a porphyry hanging-wall."
>
> "(3.) That the true strike of said vein, lode, or ledge is north and south, and it has a dip to the east at an angle of 15° below the plane of the horizon."
>
> Record, p. 24.

These offers of proof become material only as leading up to the fourth offer, and there was no error in severally

rejecting them, unless there was error in rejecting said fourth offer, which was as follows:

> "(4.) That said vein, lode, or ledge, on its dip aforesaid within vertical planes drawn downward through the end lines of said vein, lode, or ledge, so existing and found within said Stone surface mining claim, and continued in their own direction, viz., in the direction of the dip of said vein, lode, or ledge as aforesaid, passes through, out of, and beyond the east vertical side line of said stone surface claim and location into lands adjoining, to wit, into and under the said Gilt Edge surface claim."

The said fourth offer was supplemented by the following statement:

> "(5) That while said defendant admits that it has, underneath the surface of said Gilt Edge surface claim, followed and mined in and upon said stone vein, lode, or ledge, by reason of the facts and premises above set forth, it had a right so to do, and that it has not otherwise in any way interfered with said Gilt Edge claim, or any part thereof."
>
> Record, p. 24.

To these offers of proof the plaintiff objected—

> "On the ground that if proven the same would not be a defense to said action nor tend to establish a defense thereto, and that, by reason of the surface form or shape of said Stone claim, its owners had no right under the laws of the United States, or otherwise, to follow the lode, alleged to exist therein, in its downward course, beyond the lines of said claim and into plaintiffs' claim; and that no part of the Gilt Edge claim on" (or) "the mineral or lode within it was within vertical planes drawn downward through the end lines of said Stone claim and continued indefinitely in their own direction." Record, p. 24.

The court sustained the objection and the defendant excepted. Did the court err?

In the first place, it will be observed that the court held that the proof offered would constitute no defense, when it had before held, on demurrer to the 12th paragraph of the answer, that the same facts would be a good defense to the action.

It held that the statute should receive a *literal* construction, and that the right to go outside of the side lines depended upon the fact whether vertical planes drawn through the parallel end lines of the *surface* claim would include the premises in controversy or not In the present case, I admit that vertical planes, drawn through what are represented as the end lines of the location, would not include the locus or the ores in controversy.

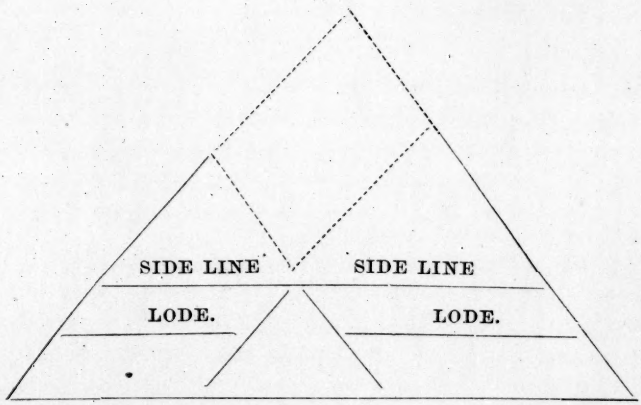
But I maintain that vertical planes, drawn through the ends of the vein found *within* the surface claim, at right angles to the strike, and continued in their own direction, would include the locus and ores in controversy, and that the statute should be so construed as to justify such a result.

The statute should receive a reasonable construction. If that given to it by the Court below is not reasonable, then some other construction should be sought which will make it reasonable in itself and practical in its execution. This Court will not fail to notice that the statute *does not require that the end lines shall be at right angles to the side lines.*

The side lines are not to exceed 1,500 feet along the vein in length, and 600 feet in width, and the end lines are to be parallel. The end lines may meet the side lines at any angle other than a right angle, and the statute will be complied with.

That being so, it is easy to see that the extent of the right, outside of the side lines, will, in a great measure, depend upon the angles made by the end lines with the side lines, and that adjoining locators upon the same vein will both be

entitled to the same premises and ores which lie outside of their locations. I can illustrate what I mean, perhaps, better by a diagram than in any other way.



The space between the dotted lines shows the premises that each location would be entitled to. It is perfectly apparent that Congress never intended to give the *same premises to two different mineral claims*, and some other construction than the literal one must be given by the courts to its enactment. Congress intended to give each locator the right to go outside of his side lines for so much of the lode as was contained within his surface limits, and that this should be done in such a way as to be just and reasonable, and not conflict with the rights of other locators. Now this can be done by confining the right to such portion of the lode as is found within vertical planes drawn at right angles to the ends of the lode found within the surface claim, whether those ends be inside of the end lines of the surface

claim, or at the end lines of the same. I can conceive of no other way in which it can be done. The courts are at liberty to adopt such a construction. They have done it where like questions were involved. In the case of non-navigable rivers, it has been uniformly held that the riparian proprietors are entitled to the thread of the stream, and that their rights are fixed (when the stream is straight) by drawing lines from the *termini* of their side lines at right angles to the course of the river, no matter what may be he course of their side lines.

In *Knight* vs. *Wilder*, 2 Cush., 208, the court said:

> "We take the rule of law to be, that upon a river not navigable, the riparian proprietor has a fee in the soil, subject of course to a public easement for boating and rafting, and the like purposes, to the thread of the stream, whether expressed in the grant or conveyance under which he holds the land or not; and it follows, therefore, that where the line of the shore is straight, each of such proprietors will have a length of line at the thread of the stream, equal to his length of line on the shore; but in case of a curved line on the shore, either convex or concave, his line at the thread of the stream will be longer or shorter, respectively, than his shore line. We are also of opinion that when there is nothing in the conveyance to modify this rule, that rule is, that the side lines of each riparian proprietor must extend from the *termini* of his lines on the shore, at right angles with the course of the river to the thread of the stream. . . . . But *prima facie*, and independently of such modification in particular cases, the general rule must be to take lines at right angles with the course of the stream to its thread or middle line. The same rule applies to to the analogous case of the division of flats, in Massachusetts, under the Colony Ordnance. *Rust* vs. *Boston Mill. Corp.*, 6 Pick., 158; *Deerfield* vs. *Arms*, 17 Pick., 41; *Emerson* vs. *Taylor*, 9 Greenl., 42. In the first and last of these cases the point of decision was, that the direction of the side lines of the riparian owner

upon the upland towards the river is not to be regarded in extending the line into the river; but regard is to be had only to the length of the proprietor's line on the shore. This, we think, is the true rule. The same rule was recognized and adopted in the case of *Sparhawk* vs. *Bullard*, 1 Met., 95, 106. This rule assumes that in the absence of any direction given by the proprietor's grant, and where the shore is straight, the course is to draw lines from the *termini* of the proprietor's lines on the shore, at right angles, to determine his rights to flats. And we think the rule is well founded in principle. The object is to give to each riparian proprietor an equal share of the bed of the river in proportion to his line on the margin of the stream, together with that portion of the bed of the stream, which lies opposite, in front of, or adjacent to his upland: and this, in the absence of any controlling grant, will be effected by the straight lines, at right angles, which will in general be the shortest and most direct lines to the thread of the stream. And we cannot perceive how this consideration can be influenced by the shape of the upland lot or by the direction of its side lines back from the river."

In *Stone* vs. *Boston Steel & Iron Co.*, 14 Gray, 233, GRAY, J., said:

"It is well settled that the side lines of the upland have no influence in deciding the dividing lines of the flats, unless referred to as guides in particular grants. . . . It is as plain as any proposition in geometry that the only way of making each parcel of flats equal in width to the boundary at high water mark is to draw the side lines of the flats at right angles with that line."

In *Clark* vs. *Campau*, 19 Mich., 325, the Court said:

"When the stream is straight, the water front will be bounded by lines drawn at right angles with the thread of the stream, protracted until they reach the ends of the shore line. Where the stream curves,

the same principle applies, and the lines running from the shore would converge or separate according as the land lay within or without the curve.

"In all cases where the ownership of the submerged land, or of alluvial increments appurtenant to riparian ownership, has come in question, the only elements which have ever been considered by the courts, have been the shore lines and the central line or thread of the stream, and the partition among adjoining owners, has been made with reference to these, but never with any reference whatever to the direction of the boundaries, or the extent of the domain on the uplands. The aim, in every instance, has been to secure to each owner such share as was indicated by his shore line and not by his lands back of it."

See also *Stockham* vs. *Browining*, 18 New Jer., Eq., 391;
Thornton vs. *Grant*, 10 R. I., 489;
O'Donnell vs. *Kelsey*, 10 N. Y., 415;
Jones vs. *Johnson*, 18 How., 150;
Jones vs. *Soulard*, 24 How., 41;
Johnston vs. *Jones*, 1 Black, 209;
And Angel on Watercourses, 7th Ed., § 56.

These authorities, and others that might be cited, show conclusively that the courts do not hesitate to adopt rules of construction in settling conflicting rights growing out of ownerships of adjacent lands on the shores of streams. The polar star which has governed them has been to adopt such rules as would result in giving to each claimant his proper share, and prevent the conflict of claims in the same premises.

The same reasons apply to the construction of the mineral laws of the United States. It is the duty of the courts to make and establish such judicial rules of construction as will make the laws reasonable and give to each claimant his just share. In the case now under consideration, this

can be done by adopting the rule insisted upon in the court below. It should be borne constantly in mind that the offer of proof, which was rejected, was to show that the strike of the stone lode was straight (from north to south), and that vertical planes drawn through the ends of the lode at right angles to the strike (to the east), would include the premises in controversy.

I maintain that the rejection of this proof was error and should reverse the judgment below.

The Court also erred in rendering a judgment against the defendant below (plaintiff in error), without any proof that the parties, plaintiffs and defendant, were citizens of different States.

The complaint alleged:

> "1. That the plaintiffs were, at the date of commencment of this suit, and each of them now is, a citizen of the State of Colorado, and that the defendant was then and now is a citizen of the State of New York." Record, p. 6.

The answer of the defendant put this material allegation in issue in the following words:

> "Now comes the above named defendant, the Iron Silver Mining Company, and makes answer to the amended and supplemental complaint of the above named plaintiffs, and answering—
>
> "*First.* Denies that the plaintiffs, or any or either of them, are or ever were citizens of the State of Colorado." Record, p. 8.

The denial could not be more complete.

The bill of exceptions shows that it contains *all* the evidence given at the trial by either party. Record, p. 24.

There was not a particle of evidence given touching the citizenship of either party.

Was it incumbent upon the plaintiffs to make this proof? I think it was.

It is a fact upon which jurisdiction depends.

The record must show all the facts necessary to give the Court jurisdiction. Nothing will be presumed.

Scott vs. *Sandford*, 19 How., 402;
Ex parte Smith, 94, U. S., 455.

The complaint in this case sufficiently shows the citizenship of the parties. But the allegation, so far as it relates to the citizenship of the plaintiffs is concerned, was expressly denied and put in issue. If this were done in proper form and so as to raise the issue, then the plaintiffs were bound to prove it in order to give the Court jurisdiction. It was in proper form. This Court has held that under the common law system of pleading, the question of citizenship must be raised by a plea in abatement, and that pleading over was a waiver of proof on that subject.

Jones vs. *League*, 18 How., 81;
Eberly vs. *Moore*, 24, Do., 158.

In this last case the Court was extremely liberal in holding what was a sufficient plea in abatement. The plea averred that the allegation of citizenship in said plaintiffs petition *is* not true; that said plaintiffs *are* not citizens of Kentucky, but are respectively citizens of Texas.

Mr. Justice Campbell, in delivering the opinion of the court, said:

> "The plaintiffs contend that the plea is a nullity, and that they were entitled to sign judgment. It is not a precise, distinct, or a formal plea, but it denies the truth of the averment of the citizenship of the plaintiffs, as they had affirmed it to be in the petition. We may say, as Lord Denman said, in *Homer* vs. *Keppel*, 10 A. & E., 17: 'Where a plea is clearly frivolous on

> the face of it, that is a good ground for setting it aside; but the plea here is not *quite* bad enough to warrant that remedy.'"

If the common law prevailed in Colorado, it might be claimed, under the authority of this case, that the plea, although not formal, was sufficient, and there being no replication, it would be taken to be true.

But there is a much better and safer ground to place this point upon, and that is, that under the Code of Civil Procedureof Colorado, there is no such pleading recognized as a plea in abatement. The first section of that Code abolishes all distinctions in pleadings between law and equity, and provides that the entire cause of action shall be stated in what is called a complaint. It further provides that the entire defense shall be set forth in what is called an answer.

Sec. 57 provides that:

> "The answer of the defendant shall contain a *specific denial of each allegation in the complaint intended to be controverted by the defendant.*"

Under this code and in accordance with its provisions the defendant below did specifically deny the allegation of citizenship set forth in the complaint. It thereby "controverted" that allegation and put it directly in issue in the clearest and plainest terms possible. This was not done as mere matter of form and without any intention of insisting upon it at the trial. The record shows that there was good reason for making this denial, for the plaintiffs had themselves, in their original complaint, alleged that the Elgin Mining and Smelting Company was a citizen of the State of Illinois. Record, p. 1.

The allegation of citizenship was a material one, and without it the court would have had no jurisdiction. It was made by the plaintiffs and specifically denied by the

defendant in the manner pointed out by the statute. It was therefore their plain duty to support their material allegation by proof, and not having done so, they failed to make out a case against the defendant.

This question is not to be determined by the common law rules of pleading, for they are abolished by the statute, but by common sense, under the statute.

It is raised by the record in this case, and must be determined by this Court.

I cannot doubt what that determination will be, and therefore ask for a reversal of the judgment below.

WALTER H. SMITH,
Atty for Pl'ff in Error.

Office Supreme Court U. S.
FILED
MAR 26 1886
JAMES H. McKENNEY,
CLERK.

118-196

Supreme Court of the United States.

OCTOBER TERM, 1885.

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vs.

THE ELGIN MINING AND SMELTING COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF OF G. G. SYMES, ONE OF THE COUNSEL FOR PLAINTIFF IN ERROR.

JUDD & DETWEILER, PRINTERS.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Brief of G. G. Symes, One of Counsel for Plaintiff in Error.

STATEMENT OF THE CASE.

This is an action at law for the recovery of the possession of a mining claim. The defendants in error brought suit against the plaintiff in error to recover possession of a portion of a lode or mineral deposit which they claimed to be a part of or appurtenant to the Gilt Edge mining claim. The complaint is in the usual form for the recovery of the possession of real property. They claim title in fee under a patent for said Gilt Edge claim.

The plaintiff in error answered and set up an affirmative

defense, averring that they owned that portion of the lode, vein, or mineral deposit in dispute found underneath the surface of said Gilt Edge lode mining claim. It further averred in the answer that it was the owner in fee of the Stone lode mining claim under a patent from the United States; that within said Stone lode claim was the top and outcrop of a lode or vein; that said vein on its dip or downward course extended into and passed beneath the surface of said Gilt Edge mining claim, which claim was located upon the dip and downward course of said vein; that it had been worked and developed on its dip underneath said claim; that the alleged trespass consisted in the defendants below working the mine on its said lode upon the portion thereof under the surface of the Gilt Edge claim on its dip aforesaid, which it had the legal right to do.

The plaintiffs below replied denying the material allegations of the answer.

The title in fee by patent to the surface of each mining claim was admitted.

The case was tried before Honorable Moses Hallet, district judge, without a jury, at the October term of the circuit court, in Denver, Colorado, in December, 1882, a jury being expressly waived by the parties.

The plaintiffs below introduced the patent and title papers to the Gilt Edge claim and plat A, which it was agreed showed the relative shapes and positions of the Gilt Edge and Stone mining claims, and plat B, which it was agreed was a correct plat of the Gilt Edge claim as shown in the patent. The plaintiffs below then rested their case.

The defendant below then introduced its patent to the Stone lode claim, which is found in the record, pages 20–23. The defendant below, further to maintain the issues on its part, then offered to prove (1) that said Stone vein, lode, or ledge mentioned in said patent was a vein or lode of rock in place bearing iron, lead, and silver in large quantities, and valuable on account thereof; (2) that the top and apex

of said vein, lode, or ledge is found within said Stone surface claim through its entire extent from north to south between walls of rock in place, a limestone foot wall, and porphyry hanging wall; that the true strike of said vein, lode, or ledge is north and south, and it has a dip to the east at an angle of fifteen degrees below the plane of the horizon; (4) that said vein, lode, or ledge on its dip aforesaid within vertical planes drawn downward through the end lines of said vein, lode, or ledge so existing and found within said Stone surface mining claim, and continued in their own direction, namely, in the direction of the dip of said vein, lode, or ledge, as aforesaid, passes through out of, and beyond the east vertical side line of said Stone surface claim and location into lands adjoining, to wit, into and under said Gilt Edge lode claim; (5) that while said defendant admits that it has, underneath the surface of said Gilt Edge surface claim, followed and mined in and upon said Stone vein, lode, or ledge, by reason of the facts and premises above set forth it had a right to do so, and that it has not otherwise in any way interfered with said Gilt Edge claim or any part thereof.

The plaintiffs below objected to any of this proof being made by the defendant below and to their introducing any evidence tending to establish these alleged facts. The court sustained the objection, and the defendants duly excepted. (See record, page 24.) The diagrams marked A and B, the diagram marked page 48, the diagram marked page 49, and the diagram marked Exhibit A were also introduced in evidence and made parts of the bill of exceptions.

No further evidence was offered or introduced on the part of the plaintiff or defendant. The court thereupon gave judgment for the plaintiff, and the defendant brings the case here for review on writ of error.

It will be seen from the above that the court refused to allow the defendant below to make any proof whatever which, under the statute, section 2322, entitles the locator of a mining claim on the top or apex of a vein to follow the

vein on its dip or downward course into the land adjoining, except that the court admitted in evidence the patent to show title to the surface of the Stone claim. The defendant below was not allowed to show that there was a vein or lode, or the top or apex of a vein or lode, or the direction of the strike or dip of the vein or lode, or that such vein or lode extended on its downward course into the land adjoining and underneath the surface of the Gilt Edge claim.

The opinion of the court below and the reasons for ruling out this evidence do not appear in the record; but the same question arose before the court on a bill in equity to enjoin the defendants below from working on the vein underneath the Gilt Edge claim, and the brief of defendants in error cites what they state to be a portion of the opinion of the court. From this it would seem that the reason of the court for not allowing the defendant below to prove any facts whatever which under the law gives the locator upon the apex of a vein the right to follow it on its dip or downward course was that the form or shape of the boundary lines of the Stone claim were not such as to give the defendant below any right in any event to follow the vein on its downward course into the land adjoining.

The issue of law presented in this case is, Has the plaintiff in error the legal right under any circumstances or on the proof of any state of facts to follow its vein on the dip or downward course beyond the boundary lines of the Stone claim? If so the court erred in ruling out the testimony.

The defendant below offered and attempted to prove everything which would entitle it, under section 2322, to follow the vein on its downward course into the land adjoining, and that a portion of the land adjoining was the Gilt Edge claim; but the court refused to allow any proof whatever to be made.

ASSIGNMENT OF ERRORS.

First. The court erred in refusing to allow the defendant below to prove that the mineral deposit in the Stone claim is a vein, lode, or ledge rock in place bearing iron, lead, and silver in large quantities, and is valuable on account thereof.

Second. The court erred in refusing to allow the defendant below to prove that the top, apex, and outcrop of said Stone vein, lode, or ledge was found and existed within the boundary lines of the said Stone lode mining between walls of rock in place.

Third. The court erred in refusing to allow the defendant below to prove the true strike of said lode or that the direction of the strike was north and south, or to prove the dip of said lode, or that it was at an angle of fifteen degrees below the horizon.

Fourth. The court erred in refusing to allow the defendant below to prove that said lode on its dip aforesaid within vertical planes drawn downward through the end lines of said lode or vein found within said Stone surface claim continued in their own direction, and in the direction of the dip of the vein passed out of the side line of said Stone mining claim into the land adjoining, to wit, into and under the said Gilt Edge surface claim.

See Record, p. 24.

BRIEF AND ARGUMENT.

The United States patent to the Stone lode claim expressly granted to the patentee therein, his heirs and assigns, the said mining claim and appurtenances in the following language:

"Now, know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted,

and by these presents do give and grant, unto the said Alvinus B. Wood, and to his heirs and assigns, the said mining premises hereinbefore described as lot No. 217, embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred (1,500) linear feet of the said Stone vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits, in their downward course, may so far depart from a perpendicular as to extend outside the vertical side lines of said survey."

Record, p. 22.

It cannot be contended that the granting clause of this patent is not in accordance with the provisions of section 2322. It distinctly grants to the patentee, his heirs and assigns, three things: (1) the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey; (2) fifteen hundred linear feet of the said Stone vein lode, ledge, or deposit * * * throughout its entire depth, although it may enter the land adjoining; (3) and also all other veins, lodes, etc., which have their tops and apexes within the exterior lines of said claim at the surface.

The court for some reason decided that the second granting clause of the patent was void and had no effect, and refused to allow the defendant below to introduce any evidence whatever to establish its right or title to the Stone lode or vein throughout its entire depth, *although it might enter the land adjoining.*

It must be assumed in deciding this case that there is a lode or ledge of valuable mineral deposit within the meaning of the statute within the Stone claim; that the top and

apex of said lode or vein is found and extends through the said Stone lode claim, and that said vein extends on its dip or downward course in an easterly direction and underneath the Gilt Edge claim of the plaintiff below to the point where defendants are alleged to have trespassed on account of following said vein and working upon it.

THE COURT SHOULD PROJECT END LINES ON THE TRUE DIP OF THE LODE.

The form of the Stone claim on the surface is somewhat peculiar; but we submit this should not deprive the plaintiff in error of its right to follow the vein on its downward course. The plaintiff in error should not be deprived of its portion of the downward course of the lode because the form of the claim on the surface was not a matter of choice by the original locators, but a matter of necessity, from the form of the ground and the line of outcrop or apex of the vein along that portion of the lode. Plat A in the record shows the form of the Stone lode claim and its location on the surface with reference to the Gilt Edge claim of the defendant in error. The plat in the record next to said Plat A, marked page forty-eight, shows the boundary lines of the Stone claim, and in a red line meandering through the claim from one end line to the other shows the supposed line of apex, top, or outcrop of the lode, and the red dotted lines show the direction of the true dip and strike of the vein.

The plaintiff in error offered to prove that this line of apex is found and developed as shown upon this plat; that the direction of the true strike and true dip of the vein is as shown by the red dotted lines on this plat, and that end lines projected on the true dip of the vein, crossing the Stone claim at each end at right angles to the true strike, would include that portion of the dip or downward course of the vein found underneath the surface of the Gilt Edge claim.

This evidence was ruled out by the court, and this is one of the principal assignments of error relied on. The court held this evidence incompetent and irrelevant for the reason, as stated, that the form and shape of the Stone claim on the surface and the form and direction of the end lines and side lines of the claim were such as to deprive the plaintiff of any right to follow the vein on its dip into the land adjoining; in other words, that the claim had been so located with reference to the form and shape of its boundary lines that the owner was deprived of all rights to follow the vein on its dip or downward course under the provisions of section 2322 of the Revised Statutes and the patents.

See Record, page 23–24.

We contend that this ruling of the Court practically deprives the owner of a mining claim of his right to follow the vein on its dip, as expressly granted in the patent, when the mining claim is located on the surface in accordance with the express requirements of the decisions of this Court. As shown by the plat referred to above, the outcrop and apex of this vein meanders through the claim nearly midway between the side lines. The erosion of California gulch through the lode or vein at this point has caused the outcrop of the vein to appear on and near the surface in this form. The claim could be located in no other shape to include within its side boundary lines the outcrop and apex of it.

By a series of decisions in Colorado and Nevada, finally affirmed and the law settled in this Court in the case of Mining Company *vs.* Tarbot, 8th Otto, 463, the locator of a mining claim can hold only the portion of a vein or lode the top or apex of which is found within the vertical side boundary lines of the claim—that is, the claim must be located upon the line of the top apex or outcrop, whether that line of outcrop or apex corresponds with the true strike of the vein or not. In that case the Court say:

"The principal difficulty in the case arises from the fact that the surface is not level, but rises up the mountain in going from the Titus discovery to the Flagstaff. The dip of the vein being northeasterly, it happens that by following a level beneath the surface the strike of the vein runs in a northwesterly direction, or about 50 west. In other words, if by a process of abrasion the mountain could be ground down to a plain, the strike of the vein would be northwest instead of west, as it now is on the surface; or, at least, as the evidence tended to show that it is. In that case the location of the defendant in error would have the vein to its right, and the location of the plaintiffs in error would not reach it until several hundred feet to the north of the Flagstaff discovery.

* * * "We do not mean to say that a vein must necessarily crop out upon the surface in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein and locations may be properly made on the surface above it so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface explorations, we think that the act of Congress requires that this course shall be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practical rule is to regard the course of the vein as that which is indicated by surface outcrop or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined."

Under the act of 1866 some decisions were made holding that the vein was the principal thing and the surface ground an incident, and that if any portion of the vein was found within the boundaries of the claim the locator and patentee

would hold, say, 1,500 feet of the vein, although but a small portion of the top, outcrop, and apex of it was found within the side boundary lines of the claim. This was also strenuously contended for after the passage of the act of May, 1872, and some decisions were made in *nisi prius* courts in Utah and elsewhere holding that the oldest locator would take the full length of his claim on the lode whether the top or apex of the lode was included within the side boundary lines of his claim or not. The territorial and United States circuit court of Colorado decided that a locator would hold only that portion of the vein on its dip the top, outcrop, or apex of which was included within the side lines of the claim. This was afterwards followed and the law settled in the case of Wolfley and Skinner *vs.* The Lebanon Mining Company, 4th Colorado, 112. The same question was much litigated in Nevada and conflicting decisions rendered, but it was there finally decided by the supreme court that the locator and patentee could only hold that portion on the dip of the vein the top or apex of which was included within the boundary lines of the claim.

Gleason *vs.* Martin White Mining Co., 13 Nev., 443.

The rule of law established by these decisions and the rule laid down by the court below in this case places a discoverer and locator who desires to obtain the title under the statute to a portion of a lode or vein where the accidents of nature have given the direction of the outcrop and apex of the vein such a meandering course as found in the Stone claim in a peculiar dilemma. If he includes the top and apex within the side lines of his claim he must locate it in the form that it was located in this case. If he locates his claim substantially in the form of a parallelogram he will include only a very small portion of the top and apex within its boundaries. If he does locate his claim so as to include the top and apex the court will not allow him to follow the vein on its dip because of the peculiar form and direction of the side

and end lines. If he locates his claim substantially in the form of a parallelogram he will include only a small part of the top, outcrop, and apex, and the title to his claim under the above decisions will carry only that small portion of the dip of the vein.

If the decision of the court below is to be sustained the discoverer of the vein must blame the deficiencies of the statute or the accidents of nature. He has certainly done the best he could under the circumstances to avail himself of all the rights the law will give him on account of the original discovery and attempted location of a lode or vein. This is not an imaginary case.

In the Flagstaff case, 8 Otto, pp. 47, 48, the court further say:

"We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode and extend perpendicularly downwards and to be continued in their own direction either way horizontally, and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode and his claim is only one hundred feet wide that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins."

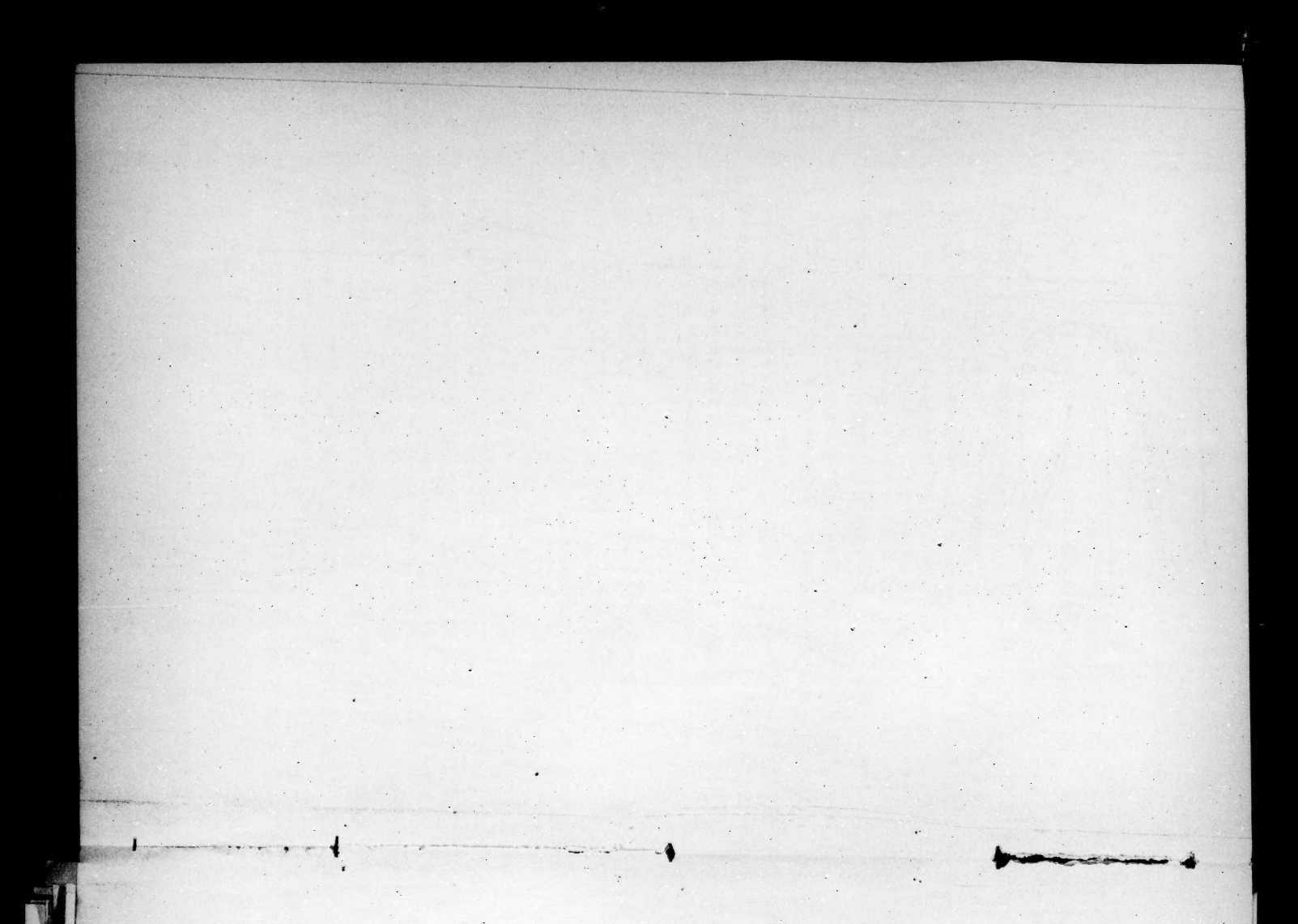
We submit that the equitable way to construe the statute in its application to such cases is for the court to establish end lines running across the claim upon the true dip of the lode—that is, at right angles to the true strike of the lode. That such end lines should be established crossing the lode at the extreme points, where the top or apex of the lode is included within the side boundary lines of the claim, and vertical planes should be drawn indefinitely forward and downward through such end lines. This will give to the original discoverer and locator that portion of the dip of the lode and such extra lateral rights as the statute intended to grant him.

The extension of a lode in a horizontal direction is called the *strike;* the angle which it makes with the plane of the horizon, the dip.

Von Colta on Ore Deposits, Prime's translation, p. 26.

Dr. Rossiter W. Raymond has written an able paper upon "The Law of Apex," "The Extra Lateral Rights Granted to a Locator," etc. He is one of the ablest of mining engineers and has had great experience. He has for years paid special attention to the construction and application of mining statutes, to the subject-matter of the formation of veins and lodes, and the titles thereto. He has given an illustration of the difficulties arising in a case where the formation of the surface causes the course and direction of the outcrop to be very irregular and meandering, and in some places more in the line or direction of the true dip than of the true strike of the lode.

The illustration hereafter given is not only applicable to this case, but it is absolutely in point. The formation of the outcrop of the vein extending across California gulch through the Stone mining claim has the same direction and formation (as shown in the plats referred to in the record) as that portion of the line of outcrop and apex upon the diagram hereafter given, lying between the two outcrops *z* and *w*.



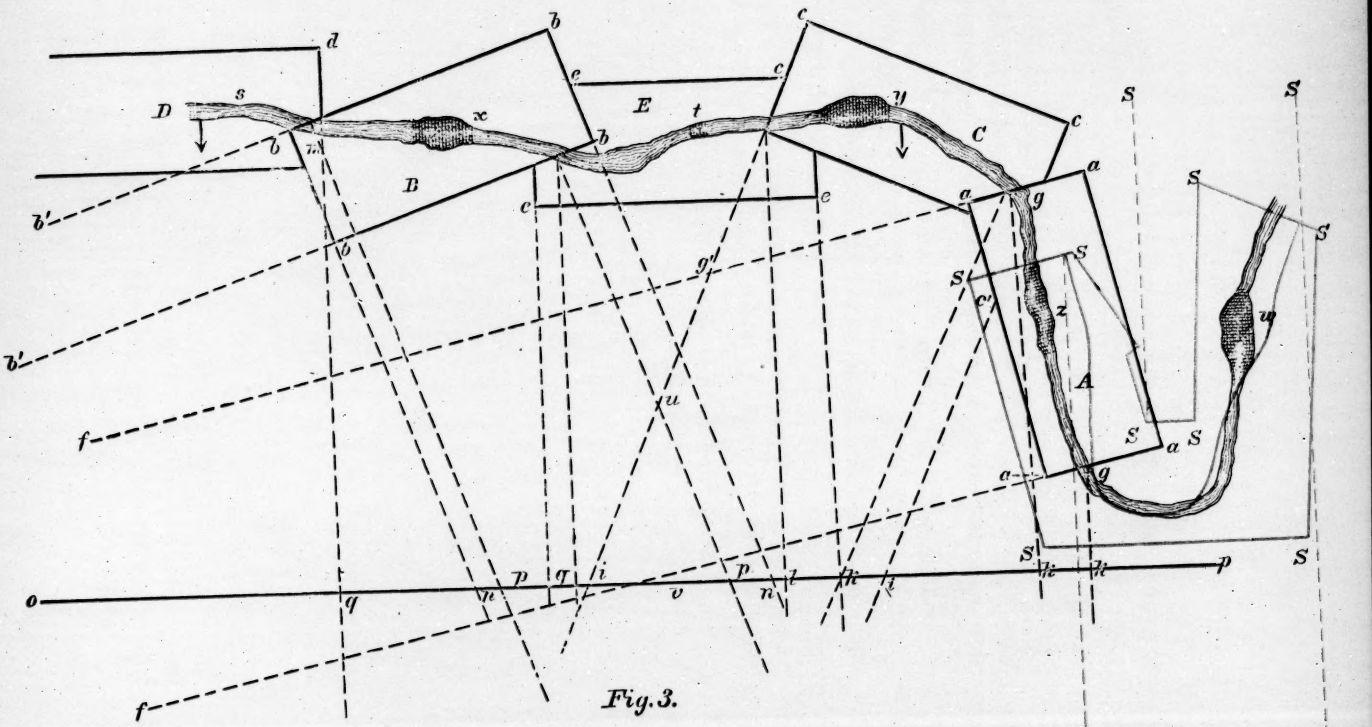


Fig. 3.

We give the following portions of the text and the diagram marked Figure 3, from pages 49–51 of the pamphlet above mentioned:

"This matter will be more clearly appreciated after a study of Fig. 3, which is taken, with considerable modification, from a diagram furnished by Chief Justice Beatty, of Nevada, to the public lands commission (Report, p. 403). This figure represents the apex of a lode, A C E B D, dipping as shown by arrows in the rectangles C and D. At *x*, *y*, and *z* there are croppings upon the surface. The lode is supposed to be perfectly uniform in strike and dip, the true strike being shown by the line O P, which is a horizontal line drawn in the lode. The variations in the course of the apex are due to the topography of the surface, the most violent of them (from C to A) being caused by a precipitous ravine which cuts through the vein, exposing an outcrop, *z*, in the face of the precipice, while on the other side of the ravine the outcrop *w* shows the continuation of the same vein, unaltered in its true strike and dip.

"Between the outcrops *x*, *y*, and *z*, to the left of *x*, and on both sides of *w*, the course of the apex has been determined by shafts and costeaning pits. Upon this lode A, B, C, D, and E have made locations. A, discovering the outcrop *z* in the ravine, before any other explorations, made the location *aaaa;* B next made the location *bbbb* upon *x;* then C located *ccc* upon *y;* after which D, finding the apex with the shaft *s*, and E, finding it with the shaft *t*, made their locations respectively as shown. Now what are the rights of the parties?

"Let it be observed that this case has been studiously freed from complications such as occur in most mining lawsuits. There is no controversy as to facts. There is no change of dip or strike, no fault, no indefiniteness of lode or walls, no dispute as to priority, no formal defect of title, no peculiar local regulation or custom. A and B we will suppose have patents. C, D, and E are indeed subject to reservations of rights of prior locators, covering portions of their claims; but this a common occurrence, and by no means invalidates the claims or hinders the obtaining of patents."

"According to the views of Judge Beatty, already quoted,

E, though locating after B and C (the case of A is not in Judge Beatty's diagram and is not considered by him), is nevertheless the owner of all that section of the lode included between the lines *m q* and *c l* indefinitely prolonged. He asserts that the claims of B and C do not include the top or apex of this section. According to this view the lines *m q*, *m q*, *c l*, *g h*, *g h*, in the diagram, being the projections of lines drawn in *the true dip* downward from the end of each section of the apex claimed, are the true boundaries of the extra-lateral rights. * * * The statute does not prescribe any regular way of following the dip. Let us take, for instance, the case of A. He is the first man on the ground. He is, so to speak, an intending purchaser of mineral lands, come at the invitation of the Government to look over the unoccupied territory, and decide what piece to buy. No third party is affected by his decision. The statute says to him, "Find a lode, locate a claim not exceeding such a size along the apex, and having complied with certain forms and conditions you shall own * * * all lodes, throughout their entire depth, the top or apex of which lies inside of such surface-lines, extended downward vertically, although they extend, in their course downward, outside the vertical side lines. But your right of possession to such outside parts shall be confined to such portions thereof as lie between vertical planes drawn downward through the end-lines of your location."

"But how shall I draw my end lines?" inquires A. "Parallel to each other," replies the statute. "Be sure you draw them across the apex," adds the Supreme Court.

"What is the apex?" he inquires further. The statute is silent; but the Supreme Court says, "That may not always be easy to determine; but one thing is certain—if you follow the outcrop, or the edge of the vein nearest the surface, whether level or inclined, you have got it."

"Following these directions A makes his location *a a a a*, and it is hard to say why he is not entitled to the section of the lode between the lines *a f*, *a f*, extended indefinitely. The statute does not hint and the Flagstaff decision does not clearly imply that end lines actually crossing the apex can be objected to as boundaries for the extra-lateral right. Nor can B, C, D, and E complain. They have not yet arrived. When they do arrive they must take what is left. Their rights, whatever they may be, will stop at the upper line *a f*,

and recommence at the lower line *a f*. We have thus the remarkable proposition that of the point *u* in the lode A is the owner, by virtue of the apex in his claim, while of the point *v*, directly below it on the dip, B is the owner, by virtue of the apex in his claim; and, continuing down in the same line, a point would at last be reached below all the rights of A, B, C, and belonging to E. This is an absurd result, and doubtless was not contemplated by the makers of the law. Yet how can it be avoided? There seems to be but one possible way. The courts may say to A "The extra-lateral right granted to you was based on the condition that the lode in its course downward extended outside your side line. *Now, this course downward must be taken on a true dip.* You cannot follow the lode in the direction of your end lines in this case, if you thereby interfere with other, even later, locators, who are following the dip in a regular way." If this be a permissible construction of the law, Judge Beatty's view would be sustained, and A, who located, as he supposed, a length, *g g*, of the lode, would find his real length reduced to *h h*. And there would be other results. The uniform ruling of the courts as to end lines would be overthrown, and the "iron-clad potency" of United States patents would be sadly impaired. Turning back, for instance, to Fig. 2, we may see that the location *b b b b* has end lines obliquely crossing the apex. Thousands of mining claims have this form, and the extra-lateral right, bounded by *b b'*, *b b'* has been maintained in innumerable instances. To demand that this right shall follow the true dip would make the definition of the right difficult in many cases in the early stages of exploration."

Let us apply the foregoing Figure 3 and the comments illustrating it to the case at bar. We have added to the diagram a location representing the Stone lode claim, marked S S, S S, S S, at the principal corners and angles of the claim, and have projected the end lines in dotted red lines in the direction of the true dip of the lode at this point, where we contend they should be established by the Court.

It will be seen that a portion of the apex of the vein shown by the red line on the diagram in the record, marked page 48, follows partly near the true strike of the vein near the

center of the claim and partly near the true dip of the vein towards both ends of the claim. If the end lines of the claim are established and projected as we have placed them upon Figure 3 it will give the owners of the Stone claim about one-half the number of feet on the dip and downward course of the vein they would have obtained by the location of their fifteen-hundred-foot claim, provided the formation of the surface at this point had left the course of the outcrop somewhat in the direction of the true course and strike of the vein. Hence under the construction of the statute that we contend for in this case the plaintiff loses about one-half of the fifteen hundred feet of the vein by the accidents of nature, namely, by the erosion of the gulch through the vein or lode at this point.

This Figure 3, as before stated, represents the actual condition of things on the ground. This construction of the statute will deprive no prior or junior locator of adjoining claims on the top or apex of the same lode which extend to the right and left of this ravine of any portion of the dip they are entitled to. The top and apex of this vein has been developed and claims so located upon it for about one mile both to the right and left of the Stone claim; that is, to the right and left of where California gulch, a deep ravine, has cut through the vein and caused the change in the course and direction of the apex or outcrop, as illustrated upon the plat in the record and in figure 3.

Certainly a locator ought not to be deprived of any extra-lateral rights or any portion of the downward course of the lode on account of causes which he could not control, having changed the course and direction of the outcrop; nor should he be allowed to so locate the end lines of his claim as to include large and valuable portions of the dip or downward course of the lode, which justly, under a proper construction of the statute, belong to adjoining locators of claims on the top and outcrop of the same mineral deposit. This is forcibly illustrated in figure 3 by the claim marked *a a a a* at the

corners, located where the course of the outcrop is very near in the direction of the true dip in which the dotted end lines *a f*, *a f* extended take in a large portion of the dip or downward course of the lode and extra-lateral rights which properly belong to the claims located by B, C, and D.

The defendants may contend that this construction takes in that portion of the dip of the vein underneath the surface of their Gilt Edge claim, which is located on the dip of the vein. This is so; but they have no rights under the statutes by any construction whatever that give them a cause of complaint. Their Gilt Edge claim is not located upon any portion of the outcrop of this vein or mineral deposit. Under a correct construction of the statute they have no title whatever to any portion of the vein, because they have no location upon any portion of the top outcrop or apex. Section 2322 gives no mineral rights to any portion of any lode deposit, extra-lateral or otherwise, to a person who has not located his claim upon the top outcrop or apex of the vein. They have no rights under any construction of the statute which they can set up in this case against the Stone claim or against any of the claimants adjoining the Stone claim to the right or left of it where they have located upon the top or apex of the lode.

They went upon the dip of this lode and located a claim, as shown by the record, many years after the Stone claim had been discovered and the location made upon the apex of the vein. They do not pretend to be upon the top or apex of any vein, but they located their surface ground, and by virtue of title to that surface are attempting to deprive the discoverers and locators upon the apex of the vein of a portion of the dip and downward course which belongs to said locations on the apex.

The establishment of end lines on the true dip of the lode—that is, at right angles to the true strike or course of the lode—to define the rights between neighboring claimants, is often necessary to carry out the true intent of the statute where

the course of the outcrop is in accordance with the true strike of the lode. Locators upon a lode where the apex is in the line and direction of the true strike often establish their end lines so as to deprive adjoining locators of large portions of the dip and downward course of the lode, which it is very clear the statute intended them to have.

This is well illustrated by the following diagram, marked Figure 2, which is taken from page 44 of "The Law of Apex" above referred to and the comments of the text illustrating the diagram:

"The diagram represents the outcrop of a lode, L L, dipping as shown by the arrows. On this lode A makes the first location *a a a a*, and obtains the extra-lateral right between vertical planes drawn through *a a'*, *a a'*. The next location is made by B, who, however, prefers to draw his end lines *b b* inclined to the course of the lode, so that his boundaries *b b'* on the dip continually depart from those of A. Each of them has complied with the law, but when C undertakes to lay a third location between them, if he make one of his end lines coincide with the end line *a a* of A, he cannot, under the rulings of the General Land Office, make the other end line coincide with *b b*, the end line of B, but must run it from the point *e* (the crossing of the lode with *b b* in the direction of *e f*, parallel with *a a*, leaving the triangle *f' e b'*, which nobody can locate, although the claim of C may be much less than 1,500 feet long."

On this case the following observations may be made:

"1. It is not quite true that nobody can locate the triangle referred to. Whoever—B, C, or another—first finds ore in the lode L L, or any other lode within the vertical planes *e f'*, *e b'*, can cover it with a surface location, which will simply lack the extra-lateral rights. This location may have a maximum size of 600 by 1,500 feet.

"2. If C's only recourse were to take the end lines *a a* he would not be wronged, for his claim, at any level beneath the surface would be just as long as it at the surface. He would have everywhere the same number of feet on the lode.

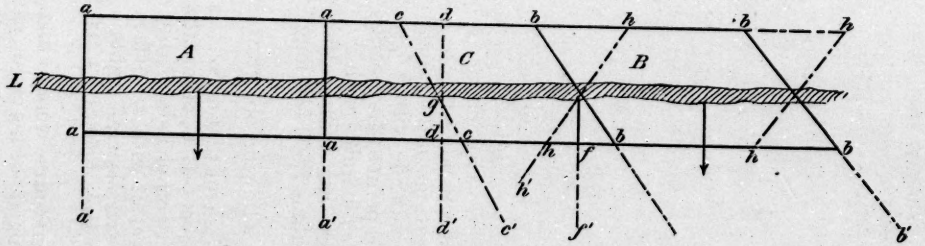


Fig. 2.

"3. But, in fact, C has here the opportunity of doing better than this. He can draw an end line, *c c*, parallel to *b b*, and locate the claim *b b c c*. Then, drawing through *g* (at the crossing of the lode), an end line *a a d d*, he can locate or cause to be located the claim *a a d d*. Then he will be entitled under the first location to the extra-lateral ground *b c c' b'*, and under the second to add a^1, and the triangle *d' g c'* will be in the heart of his ground, where nobody can get access to it, provided the vein dips steeply enough to bring it, at *d c*, so deep that a vertical shaft to strike it would be an expensive work. If he can secure a surface claim, covering this triangle as far, for instance, as *d'* and *c'*, he is still further protected. Assuming the vein L to dip 45 degrees and the width of the claim, as shown in Fig. 2, to be the full width of 600 feet, the vein at *d'* and *c'* would be nearly 900 feet vertically below the sruface. C would thus possess practically the extra-lateral right bounded by *a b b' a'* or a longitudinal extent of the lode increasing with depth. If, however, instead of the case which Mr. Wrinkle supposes, the location of B had the boundaries *h h h h*, it is easy to perceive that C could in no way avoid the cutting off of his claim in depth by the intersection of *h h'* and *a a'*."

"But these and other similar problems are among the simplest, because they assume the apex to be in the line of the true strike—that is, the direction of a horizontal line midway between the walls of the lode—and to be crossed by the end lines of the location, the side lines of which would, therefore, be parallel with the strike of the lode. More complicated questions arise when the true course of the lode is curved or crooked, or the outcrop, not being level, is not in the line of strike, or the outcrop or apex crosses one or both of the side lines."

It seems to us this illustration shows that the only just and practical way of carrying out the intention of the statute regarding extra-lateral rights given to locators upon the top and apex of a vein is to project end lines across the claims of all the neighboring locators at right angles to the strike—that is, in the direction of the true dip of the vein.

This will give each lawful locator upon the apex the extra-lateral rights—that is, the number of feet on the dip and downward course of the vein the statute intended to grant him. We submit that any other construction of the statute will deprive many locators of their legal rights and will give to many others large portions of the dip of veins which it was the intention of the statute they should not have.

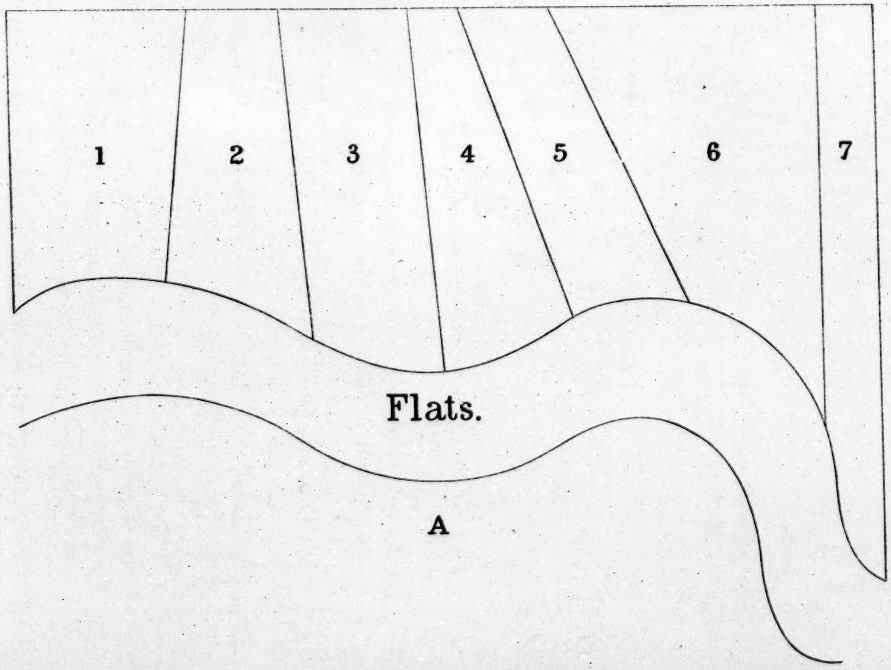
The statute does not prescribe the particular direction in which the end lines shall be established on a lode. It only provides that the end lines shall be parallel to each other. (See section 2320.) In the Eureka case, 4th Sawyer, 319, the Court holds this provision of the statute to be directory. The Court say:

"In the second place, the provision of the statute of 1872 requiring the end lines of each claim to be parallel to each other is merely directory and no consequence should be attached to a deviation from its direction. Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations on the length of the lode."

The rule established in this case was to establish end lines at the extreme ends of the mining claims drawn vertically down through the dip of the lode. The case was affirmed in the Supreme Court, but this question was not dwelt upon in the opinion.

A similar principle of law has been decided to apply to alluvium flats on the banks of water courses and seems to be applicable to the rule we contend for. In sections 55 and 56 of Perkins' edition Angell on Water Courses this subject is fully treated and explained and the leading cases cited. We quote the 56th section, and give the accompany diagrams, which well illustrates this principle:

56. "Analogous to the decision in the case cited in the preceding section is the rule as to the apportionment of *flats-ground* in Massachusetts and Maine. In Emerson *vs.* Taylor,


1
2
3
4
5
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Flats.
A

1
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A
B
B
B

in the latter State, the question was in respect to the side lines of water-lots from the upland to low-water mark, under the colonial ordinance of 1641. The language of the ordinance referred to is that 'in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to low-water mark, where the sea doth not ebb; above a hundred rods, and not more, wheresoever it ebbs and flows.' The expression 'to low-water mark,' seemed to the Court to imply to the water-mark in the nearest direction, and without any regard to the course of the side lines of the upland to which the flats are adjoining and appurtenant. Such a construction appeared to the Court more consistent than any other with the respective rights of contiguous owners of upland; and in some cases the Court considered, where the upland adjoins a cove, and the contiguous lots are so laid out or bounded as that their side lines strike the cove (as some of them necessarily must) obliquely, the above rule must be applied as the general rule of construction; otherwise, the extension of the side lines and one of the upland lots in a straight direction might, in some cases, deprive an adjoining lot of all benefit of the flats; and according to the plan on the following page, marked A, it would cut off from lot No. 6. most of the benefit of the flats adjoining it."

The Court, in giving their opinion, say: (9th Greenl., 42.)

"After a careful examination of the subject we perceive but one construction or application of the principle of the ordinance which will do justice to all concerned. The mode of applying the principle is this: Draw a base line from the two corners of each lot where they strike the shore, and from those two corners extend parallel lines to low-water mark, at right angles with the base line. If the line of the shore be straight, as in the case before us, there will be no interference in running the parallel lines. If the flats lie in a cove of a regular or irregular curvature, there will be an interference in running such lines, and the loss occasioned by it must be equally borne, or gain enjoyed equally by the contiguous owners, as appears by the following plan, marked B. By the foregoing plan it will be noticed that the parallel lines, running at right angles with the base lines, are merely dotted, while the base lines and the true division lines be-

tween the flats, belonging to the respective upland lots 1, 2, 5, 6, have their appurtenant flats converging from the upland to low-water mark, in consequence of the recess and curvature of its margin, while the lots 3 and 4 have their appurtenant flats wider at low-water mark than where they join the upland, in consequence of the projection of each lot into the stream. On the same principle, where there is an extended projection of upland of any form, or an island belonging to different owners, each one's lot being bounded on the sea or the tide-water in which the island is situated, the surplus width of the flats at low-water mark, arising from the form of the upland, must be divided among the contiguous owners of such upland, and the mode of division and the result are to be ascertained by drawing base and parallel lines in the manner before mentioned, and then making an equal division of the surplus. By this process justice will be done, and all interference of lines and titles prevented. We are not aware of any cases where, in apportioning appurtenant flats among contiguous owners of upland, the foregoing principles and mode of proceeding would not be properly applicable as the rule of decision. Still we do not undertake to affirm that there may not be some peculiarity in the form of the upland to which flats are appurtenant, and some peculiarity of manner in which the upland may be divided among contiguous owners, the effect of which we have not anticipated, which would vary the principle. Should any such cases hereafter present themselves, requiring the application of a different principle, such new principle must of course be applied."

We have added to plat B the red line A A, which represents the apex of a lode crossing lots numbered from one to seven, inclusive, the side boundary lines of which may be taken to represent the end lines of adjoining mining claims on the apex of the vein. We have drawn what may be called the base line B B, which represents the true strike of the lode at a point so far beneath the surface as not to be affected by erosion or unevenness of the surface. We have drawn dotted red lines from the points where the apex of the vein leaves each end line of the claims in the direction of the true dip of the lode—that is, at right angles to the strike.

In the application of this principle we treat the extra-lateral rights, called the dip or downward course of the lode, the same as the appurtenant, known as alluvium flats, on the banks of water-courses or tide waters. We do not see why the same principle should not apply. The side lines of the water lots mentioned in the case of Emerson against Taylor (9th Greenleaf, 44) are treated as the end lines of lode mining claims. The language of the ordinance referred to and construed in this decision is as follows: "In all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to low-water mark, where the sea doth not ebb; above a hundred rods, and not more, wheresoever it ebbs and flows." In this case the owner of one of the lots from one to seven could, if he was one of the original locators on the public domain allowed by statute to locate a certain lot on the banks of tide water which would carry with it certain appurtenant rights to the land for one hundred rods beyond high-water mark, or, in case it was upon the bank of a river which receded and alluvium flats were formed, could so shape the direction of the side lines of his lot as to deprive the adjoining owners of a large portion of their equitable rights to the alluvium flats or the land adjoining beyond high-water mark, if the division lines should be extended into the river or the sea parallel with the boundaries.

It might happen by a sharp bend of the river that the side boundary lines of a lot abutting on the stream would take such a direction, if prolonged, as to take in a large portion of the flats which equitably belonged, as appurtenant, to the owners of adjoining lots.

We submit that the same injustice will result to the owners of mining claims adjoining a claim located on the outcrop and apex of a lode, which by the accidents of nature has a form like that of the claim marked *a a a a* in figure 3, above referred to, taken from "The Law of Apex." In the case of

Clark *vs.* Campau (19th Michigan, 326) the same principle is decided.

Saulet *vs.* Shepherd, 4th Wall., 502.

Bay City Gas Light Co. *vs.* the Industrial Works, 28 Mich., 182.

The principle decided in these cases and the cases cited applicable to the appurtenant rights of the owners of land on the banks of rivers seems to be that a base line is to be drawn in the center of the river, called the thread of the stream, in the direction of its general course, and then boundary lines are to be established at right angles to this base line, extending parallel with each other from the points where the boundary lines of the lots reach the bank of the stream to the base line.

If we treat this base line in the center of the river as the line of strike drawn through a lode or vein on a level beneath the surface and then establish end lines at right angles to this line of strike from the points where the apex of the vein crosses the boundary line from one claim to another we would establish the same equitable rule of law, and every owner of a lode claim upon the apex or outcrop of a vein would be awarded such extra-lateral rights on the downward course of the lode as the the statute clearly intended to grant him.

We submit that the judgment should be reversed, and the case remanded for a new trial.

G. G. SYMES,
Of Counsel for Plaintiff in Error.

Sir Duggan et al vs Davey
Supreme Court Dakota
N. W. Reporter. March 13th/86.
p 887.

118-196

FILED
JAN 14 1886
JAMES H. McKENNEY,
CLERK.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1885.

No. 200.

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Plaintiff in Error,

VS.

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Defendants in Error.

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ARGUMENT OF DEFENDANTS IN ERROR, NEWTON, DENISON, CARPENTER, HAVENS, BEEMAN AND HAVENS.

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The Plaintiff in Error claims the mineral underneath the surface of the Gilt Edge lode by virtue of the provisions

of the Act of Congress, May 10, 1872.

Rev. Statutes, U. S. Sec. 2322.

The patent to the Stone lode was issued to the grantor of the plaintiff in error under the authority conferred upon the officers of the land department by the same Act of Congress.

Rev. Statutes, Sec. 2325.

The grant must be and is limited by the terms of that Act to the vein located within the surface boundaries of the claim and such parts of the vein outside the boundaries as in its downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said Stone claim. "*Provided*, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said *survey* at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits."

Transcript of Record, folio 42.

The Stone lode claim was located, surveyed and patent obtained by the grantor of the plaintiff in error to suit himself. No one interfered. Its end and side lines were chosen by him. Neither the Government nor the courts can change them to suit his convenience or whim at this time.

No part of the Gilt Edge lode claim lies within planes drawn downward through the end lines of the Stone survey at the surface.

No matter where the end lines of the vein, lode, ledge or deposit called the Stone lode may be, or how planes may be drawn downward through such end lines. Neither the Act of Congress nor the patent gives such locator or patentee

the right to follow the vein, lode, ledge or deposit into land adjoining between planes drawn downward through the end lines of the *vein or lode*, but expressly limits such right of possession to that part of the vein or lode outside of the exterior boundaries as may be found between planes drawn downward through the end lines of the *location* or *survey at the surface.*

In the suit on the equity side of the court, brought by the defendants in error against the plaintiff in error, upon application for injunction, Judge Hallett presented his view of the law in the following language:

The ore for which the parties are contending is within the surface lines of plaintiff's claim (the Gilt Edge), eastward from defendant's claim (the Stone), and adjoining the latter. It is reached by means of a perpendicular shaft from plaintiff's claim; and a tunnel or level, following, it is said, the course of the vein from a point in defendant's claim down the hillside, and below the other. Assuming, for the present, that the top and apex of the lode has been found in the Stone claim, owned by defendant, and that the lode in a downward course, and with distinct boundaries, passes eastward out of that claim and into the Gilt Edge claim, owned by the plaintiff, to the place in dispute, the right of defendant to follow it without the lines of the Stone claim, and take the ore therein, is denied on the ground that the latter claim is without end lines to define and limit such right. In the act of Congress relating to mineral lands it is provided, in section 2320, that "the end lines of each claim shall be parallel to each other;" and in section 2322 that the right of possession to the "outside parts" of veins or ledges, referring to such parts as extend beyond the side lines of the location, "shall be confined to such portions thereof as lie between vertical planes drawn downward as above described through the end

lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

In the Flagstaff case (8 Otto., 467,) the acts relating to mineral lands were said to require that locations of veins or lodes shall be made lengthwise in the general direction of such veins or lodes on the surface of the earth; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally.

The general practice in mining districts of making locations in the form of a parallelogram conforms to this view, which is now universally accepted as correct. Obviously it was not intended that a locator should secure more of the lode in the "outside parts" extending beyond the side lines than he could obtain on the course of the lode within the limits of the location. In other words, by a proper location he could secure 1,500 feet on the strike of the lode, and by the extension of the planes of the end lines, he would be limited to the same number of feet laterally in pursuing the lode downwards without the side lines. Such limitation is necessary to define the miner's right beyond his own territory. If, when once without his own lines, he could turn to the right or left in search of ore, the limitation to 1,500 feet of the length of the vein would be made wholly nugatory, and there would be no end of conflicts between adjacent owners, for which no just rule of settlement would be found.

Referring to defendant's Stone claim, the line at the northwesterly end is said to be one of the end lines, and it is so marked on the diagram. In the first course of the location from that line, which is south 83 degrees east, there is no corresponding end line; and the same is true of the second course, south 18 degrees east, and the third course, south 45 degrees west, very nearly. It will be observed that the loca-

tion is in the form of the letter A, truncate, and the locator has made a part of the inner line of the southern leg of the location 300 feet in length, to correspond in direction with the line at the northwesterly end, and called it an end line. With superficial attention to the letter of the law, and in utter ignorance and disregard for its principles, the two lines were made of equal length and parallel to each other, but so arranged that they can never perform the office assigned to them in the law. What is called the southern end line is really on the northwest side of the greater part of the claim, and so placed that, when extended in a northerly direction, it must enter the inner line of the claim in a short distance, from corner No. 5. In this position that line cannot enter the field north and east from the claim, being intercepted by the claim itself. And so it appears that eastward and southward from the northwestern end of the claim there is no line which can be recognized as an end line, and the claim has but one end line, or perhaps none whatever.

This view was not controverted at the hearing, but it was said that end lines may be a matter of legal inference and deductions from established facts to control even the act of the locator of the claim. As the law requires that a location shall be made along the course or strike of a vein at the surface of the earth, the end lines must of necessity be at right angles to the course. And whenever the course or strike can be ascertained, at the points where it passes from the location, end lines should be fixed at right angles thereto, without reference to the end lines laid in the location. To apply this rule to defendant's claim, lines should be drawn parallel to each other at each end, and where the outcrop of the vein is said to pass out of the location, and in the general direction east and west, the strike of the vein being north and south.

The circular form of outcrop is thought to be the result of erosion in California gulch, which comes down through

the middle of the claim, and at some remote time the outcrop may have extended directly across the gulch between the ends of the claim, so as to admit of a location in the usual form with end lines as now proposed to be laid, in the general direction east and west. It is contended that in the location of a claim, which must of necessity be made before the strike of the lode can be ascertained, it is too much to expect the locator to lay his end lines in the proper direction; and locations made at various angles of divergence from the strike of the lode are cited to illustrate the fact that by a slight deviation from the proper course the object of making a location may be defeated. This, however, is only to say that it is difficult to make a good location of a mining claim when the situation of the ore is unknown, and that if the locator fails to lay his claim so as to secure the ore, the law should correct his mistake. Plainly enough the law requires the locator to fix the boundaries of the claim, offering the bounty of the Government to the extent of the public domain from which to make the best possible selection. If the locator fails to choose wisely and well, the failure is with him, and it cannot be imputed to the law. There is no greater reason for saying that the end lines shall be established by inference and presumption from the course of the lode than that the side lines shall be so established. The rule of the early miners' law, which obtained in some mining districts before the statute was enacted, was of the character which we are now asked to adopt. By locating on the vein the miner secured the number of feet allowed him, wherever it might extend, with surface ground adjacent; and of course the boundaries of the claim could only be known from the course of the lode. By the act of Congress that rule was changed, and it was required that the boundaries of the claim shall be marked on the ground, and end lines and side lines are referred to in a way to show that they must be laid down with care. Under such

a statute, it cannot be necessary to discuss at length the power of the Court to establish lines by construction, for no such power can exist. The end lines established by the locator must control, and if absent or so placed as not to define the right of the locator to the exterior parts of the lode, the defect cannot be supplied.

In that case the location may be valid for all that can be found within the surface lines, but beyond those lines an essential element of the right to follow the lode is wanting, and therefore the right cannot exist. With some information as to the situation of the ore and the law relating to the subject, the end lines of the Stone claim could have been laid as it is now said they should be placed, and the failure to do so was owing to ignorance of facts necessary to intelligent action. It presents the common case of failure to obtain property through a mistake of fact or law, for which the party seeking the property is alone responsible. Against such error and misfortune the law does not relieve."

M. B. CARPENTER,
AMOS STECK,

Attorneys for Defendants in Error, John W. Newton, Charles Denison, M. B. Carpenter, G. L. Havens, J. W. Beeman and William Havens.

118-196

Office Supreme Court U. S.
FILED
MAR 26 1886
JAMES H. McKENNEY,
CLERK

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Brief and Argument for Defendants in Error.

T. M. PATTERSON,
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JUDD & DETWEILER, PRINTERS.

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There are but two questions presented by the record. Attorney for plaintiff in error injects a third one. He claims that the record does not show that defendants in error (plaintiffs below) were citizens of the State of Colorado.

This court has held that the question of citizenship must be raised by plea in abatement, and that pleading over was a waiver of proof upon that subject.

Jones *vs.* League, 18 How., 81.

Eberly *vs.* Moore, 24 How., 158.

Plaintiff in error admits this to be the rule, but he says because there is a code of civil procedure in Colorado the rule is changed in that district. He adduces no authority in support of his proposition. The question of citizenship is one peculiar to the Federal courts. In State courts the fact of the citizenship of the parties never is a question affecting their jurisdiction over the person or subject-matter. Hence the provision of the Colorado code quoted cannot in any manner affect the rule in the Federal courts, requiring issues upon questions of citizenship to be raised by plea in abatement. No such plea was filed, but defendants in error answered over, thereby waiving the question.

This question of citizenship was waived by plaintiff in error a second time, as shown by the record.

The bill of exceptions (p. 20 of printed Record) shows that after introduction of the patent for the Gilt Edge mining claim, certain stipulations were made concerning the facts of plaintiff's (below) case, "and thereupon," says the Record, "plaintiffs rested." "Whereupon defendant, to prove the issues on its part, introduced in evidence," &c.

If plaintiff in error did not intend to waive the question of citizenship, it would, at the close of defendant in error's testimony, have moved for a dismissal of the suit for want of jurisdiction, or have made some kindred motion; but it did not. It introduced or offered to introduce all of the testimony in its own behalf; and upon the case thus made the finding and judgment of the court were rendered.

We now come to the two main questions in the case. These are involved in the refusal of the court to admit certain evidence offered by plaintiff in error upon the trial. (For this evidence see p. 24, printed Record.)

As shown by the bill of exceptions "the plaintiffs, to prove the issues on their part, produced in evidence a patent from the Government of the United States *in usual form of patents for lode mining claims* for the premises sued for, called the Gilt Edge claim," etc., "and thereupon it was agreed that plat 'A' (attached to the record) *correctly represents and shows the shapes and relative positions of the said Gilt Edge mining claim and the Stone mining claim, the property of defendant; that the lines from No.* 5 *to* 6 *and from* 1 *to* 14 *on said plat are the two end lines of the said Stone surface claim, so called by the locator thereof and in the plat accompanying the application for patent.*"

We here call the court's attention to plat "A." It shows the relative position of the two claims, the subject of contention, and the so-called end lines of the Stone claim, so called by the locators of the claim, and designated as such in the plat accompanying the application for a patent. On this plat the lines of the Stone claim from 1 to 14 and from 5 to 6 are marked "end lines." It was by virtue of the patent for the Stone claim that its owners sought to enter beneath the surface of the Gilt Edge claim and extract the ores therefrom, asserting that such ores were a part of the Stone vein or lode, though outside, to the east of the side lines of the Stone claim, extended downward vertically. Because the owners of the Stone were acting upon this claim of right, this suit was brought.

With the introduction of the patent for the Gilt Edge, and the stipulation that plat "A" correctly represented the relative positions of the two claims and the end lines of the Stone, the question was immediately presented whether plaintiffs in error had any right, by virtue of the Stone

patent, to follow the vein upon which it was located outside of its side lines and into the Gilt Edge claim, and extract ore from the Gilt Edge claim, even though the ore was a part of the same vein or lode upon which was located the Stone claim, and though the apex of the Stone vein was within the surface boundaries of the Stone claim, as asserted in the offer of proof made by plaintiff in error. The court held that no such right could exist by virtue of the Stone location and patent, and hence it rejected the offered testimony.

The court, upon an application for injunction, made by defendants in error against plaintiffs in error, to restrain them from extracting ore from the Gilt Edge claim, held that the owners of a mining claim of the shape of the Stone could not follow the vein beyond the side line of such a claim into the claim of another, in any direction; in other words, that the owners of such a claim were limited by the boundary lines thereof extended downward vertically in their taking out of ore. The reasons of the learned judge in support of this position are set forth at length in the brief and argument of Messrs. Carpenter and Steck for certain of the defendants in error, on file in this case, commencing on page 3. The case is reported in full in 14 Fed. Rep., 377.

We have nothing to add to the reasoning of the court upon this question; it seems to us to be conclusive.

But we desire to present another view of the question. Even though the court might hold that from such a mining claim the right to follow the vein beyond the side lines and into the land adjoining existed, nevertheless, because the Stone vein or lode included between the *end lines* of the

Stone location continued indefinitely in their own direction would not come within the boundaries of the Gilt Edge claim extended downward vertically, at any point, the testimony rejected was all immaterial, and could, if admitted, have conferred no right upon plaintiffs in error to the vein within the Gilt Edge territory.

By reference to Plat "A," the Court will readily see that by continuing the so-called end lines of the Stone claim in either direction no part of the Gilt Edge claim will be embraced between them.

Attorney for plaintiff in error says (p. 9): "In the present case I admit that vertical planes drawn through what are represented as the end lines of the location would not include the *locus* or the ores in controversy."

The offer of proof (see 4th subdivision, p. 24, Record) is in most remarkable language. Recognizing that by the extension of the end lines of the Stone claim the *locus* embraced would not include any part of the Gilt Edge territory or vein, plaintiff in error, after offering to prove (1) the valuable nature of the Stone lode; (2) that its top or apex was within the Stone claim; (3) that the *true* strike of the Stone lode was north and south and its dip was to the east, at an angle of 15° below the plane of the horizon, in the following language offered to prove: (4) "That the said vein, lode, or ledge, on its dip aforesaid, within vertical planes *drawn downward through the inclines of said vein, lode, or ledge*, so existing and found within the Stone surface mining claim *and continued in their own direction*, viz., in the direction of the dip of said vein, lode, or ledge as aforesaid, passes through, out of, and beyond the east vertical side line of said

Stone surface claim and location into lands adjoining, to wit, into and under the said Gilt Edge surface claim."

Under section 2322 of the Revised Statutes of the United States the right of possession of the owner of a lode mining claim to *outside* parts of his vein or lode is set forth in the following express language:

"But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through *the end lines* of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

Plaintiff in error, in his offer of proof (and it is to this we must book to see if error was committed), substitutes something new in mining law for "the end lines," which when extended in their own direction, define the rights of claim owners to outside parts of their veins or ledges.

The language of the offer was:

"That said vein, lode, or ledge on its dip aforesaid within vertical planes drawn downward *through the inclines of said vein*," etc.

What are the "inclines" of a vein or lode? In ordinary mining parlance, and we know of no other definition, they are small working tunnels, which may be run upon a vein or may not, but through which the ores mined from different parts of the vein may be transported to the surface in cars run upon tracks laid therein. These inclines are run at the whim of the superintendent of the mine, as he may think judicious or economical working will warrant. They may be run *in the direction* of the dip of the vein, and this would

be true whether they would be run on the dip at right angles to the *true* strike of the vein or a number of degrees from a right angle to the true strike.

This is a substitution, by plaintiff in error, of uncertain, indefinite, and constantly changing lines for the fixed and determined end lines of the location, which the statute says must be the basis to determine the right of a claim owner to outside parts of the vein. Upon what authority is this substitution sought to be made? Neither statute nor local rule or custom is invoked in its support.

Counsel for plaintiff in error, in his assignment of error based upon this rejected offer, departs altogether from the language of the offer of the proof made on the trial. He includes this rejected offer in his fourth assignment, and states it thus:

"IV. The court erred in refusing to allow the defendant below to prove that vertical planes drawn downward through *the end* lines of the said Stone veins," etc. Thus in his assignment of error rejecting the words "inclines of said vein or lode," and substituting therefor the words "end lines of said Stone vein."

The argument of counsel then proceeds upon the language used in this fourth assignment. His position is that although Congress declared that the right of possession to outside parts of veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward *through the end lines of their location*, a true construction of the section would make it read, "*through the end lines of their vein or lode.*" What are the end lines of a vein or lode? Our answer would be, a vein or lode has no "end lines" in the statutory sense. There may be said to be two ends to a vein—the

termini thereof, but no end *lines*. If we would call the ends of the vein its end lines, then how, according to plaintiff in error's argument, would we determine the direction these end lines are to be given when seeking to fix the right of a claim-owner to outside parts of the vein? But one course would be open. A large amount of subterranean exploration must be made. Inclines, drifts, winzes, and other workings, at immense cost, must be constructed in order to determine what is called the true dip of the vein, and then from the true dip determine the true strike, which expert mining men say is the line drawn upon a plane at right angles to the dip.

This would probably be the *ne plus ultra* of mining work to the mining engineer and millionaire mining operator. But Congress was not legislating solely for these classes when it enacted the mining statutes. It intended that sufficient work should be done by the prospector, at or near the surface, to determine the course of the vein upon the surface, and having done this to locate his claim along this vein, and in doing this make the end lines of the claim parallel, and when the end lines were thus fixed his right to outside portions of his vein might be readily determined.

This whole question was clearly determined in *Mining Company* vs. *Tarbett*, 8 Otto, 463, and to this case we particularly call the court's attention.

Counsel for plaintiff in error presents in his argument a diagram, by which he aims represent to the court the conflict and trouble which may arise if the statute does not receive the construction he asks for. The learned counsel seems to forget that priority of location or priority of date in patent would probably settle the whole difficulty, for if

two claims were located with end lines, as suggested in the diagram, the owner having the prior right by location or patent would be entitled to the ore in the part of the vein shown to be in conflict. The junior locator would be compelled to take subject to the right to the vein already existing. This rule of the law is too well settled to require the citation of authority.

Then, again, the language of the statute is "between vertical planes drawn downward, as above described, through the end lines of their *location*." "Location" cannot be tortured to mean the vein or lode. The clear distinction between the "claim," the "location," and the vein or lode is made not only in section 2322, but in every section of the mining statutes.

For the most recent and the clearest definition of mining "claim" and mining location see *Smelting Company* vs. *Kemp*, 104 U. S., 636.

The authorities cited by plaintiff in error concerning the rule to be followed by riparian proprietors in defining their rights to the thread of the stream are so wholly foreign to the question at issue that to discuss them would be a waste of time. There is no statute fixing the rule or right of riparian owners, as in the case of mines. Where there is a statute which is clear and unambiguous in its terms there is no room for construction.

Defendant in error respectfully submits that the judgment of the court below was right, and it should be affirmed.

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